



FILED

Apr 17 2008, 10:28 am

Kevin L. Smith

CLERK

of the supreme court,
court of appeals and
tax court

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL GAYNOR,)
)
Appellant-Defendant,)
)
vs.) No. 62A01-0709-CR-410
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE PERRY CIRCUIT COURT
The Honorable Lucy Goffinet, Judge
Cause No.62C01-0310-FA-731

April 17, 2008

MAY, Judge

Michael Gaynor appeals the trial court's denial of his motion for change of judge and grant of the State's motion to reconsider its grant of Gaynor's motion for modification of sentence. We *sua sponte* dismiss for lack of jurisdiction.

FACTS AND PROCEDURAL HISTORY¹

The State charged Gaynor with seven crimes. On June 14, 2004, Gaynor and the State entered an agreement whereby he would plead guilty to two crimes, five charges would be dismissed, and the court would have discretion to pronounce a sentence. The court accepted the agreement and imposed a twenty-year sentence.²

Then on March 31, 2006, Gaynor moved for modification of his sentence. The State objected, but the court modified Gaynor's sentence to ten years, with six executed and four suspended. The State filed a motion to stay and reconsider the modification. The court granted the stay and set a hearing. Gaynor then moved for change of judge. At the conclusion of the hearing on April 24, 2007, the trial court denied Gaynor's motion for change of judge and granted the State's motion to reinstate Gaynor's twenty-year sentence.

On July 12, 2007, Gaynor petitioned for permission to file a belated notice of appeal. The trial court granted his petition and this appeal ensued.

¹ We note the State filed its Appellee's Brief on October 29, 2007, such that a reply brief, if any, was due by mid-November. Nevertheless, this case was not transmitted to us by the Clerk's Office until March 6, 2008. Because of the age of this case, we expedited our consideration of it.

² The two sentences were ordered served concurrently. One was 18 months and the other 20 years, for an effective sentence of 20 years.

DISCUSSION AND DECISION

Pursuant to Post-Conviction Rule 2, “[a]n eligible defendant convicted after a trial or plea of guilty may petition the trial court for permission to file a belated notice of appeal of the conviction or sentence.”

An “eligible defendant” for purposes of this Rule is a defendant who, but for the defendant’s failure to do so timely, would have the right to challenge on direct appeal a conviction or sentence after a trial or plea of guilty by filing a notice of appeal, filing a motion to correct error, or pursuing an appeal.

P-C.R. 2. Rule 2 is a “vehicle for belated direct appeals alone,” *Greer v. State*, 685 N.E.2d 700, 702 (Ind. 1997) (quoting *Howard v. State*, 653 N.E.2d 1389, 1390 (Ind. 1995)), and “does not permit belated consideration of appeals of other post-judgment petitions.” *Id.*

Gaynor is not bringing a “direct appeal [of] a conviction or sentence after a trial or plea of guilty.” P-C.R. 2. Rather he is appealing the denial of a motion for change of judge and the grant of a motion to reconsider the modification of his sentence. Accordingly, the trial court erred when it granted him permission to file a belated notice of appeal. *See Greer*, 685 N.E.2d at 702. Because we do not have jurisdiction, *see id.*, we must dismiss.

Dismissed.

VAIDIK, J., and MATHIAS, J., concur.